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Updated Submission for the UPR regarding life-without-the possibility of release or parole sentences for children in the United States

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## Introduction

The United States remains the only country in the world known to sentence children to life in prison without the possibility of release or parole—a sentence to die in prison. The Human Rights Council addressed this issue in its first review of the United States under the UPR in Recommendation 92.180:

“ Incorporate in its legal system the possibility of granting parole to offenders under 18 sentenced to life imprisonment for murder (Switzerland); Renounce to life in prison without parole sentences for minors at the moment of the actions for which they were charged and introduce for those who have already been sentenced in these circumstances the possibility of a remission (Belgium); Prohibit sentencing of juvenile offenders under the age of 18 without the possibility of parole at the federal and state level (Austria); Cease application of life imprisonment without parole for juvenile offenders and to review all existing sentences to provide for a possibility of parole (Slovakia).”

The United States has not adopted these recommendations.

This report will summarize some positive recent developments with respect to this sentence, and will update the status of the various laws in the United States with respect to this sentence. In general, while the permissibility of using the sentence has been narrowed, it is still allowed in most states and under the federal criminal justice system.

In recent years, the United States Supreme Court, in its holdings in *Graham v. Florida* and *Miller v. Alabama*, has scaled back the use of life without release or parole sentences on children. In *Graham v. Florida* (2010) the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a “realistic opportunity to obtain release.”<sup>1</sup> In *Miller v. Alabama* (2012) the Court struck down mandatory life without parole sentences for homicide offenses, finding that sentencing courts must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>2</sup> The Court noted that because children have diminished culpability and greater prospects for reform than an adult who commits the same crime, “they are less deserving of the most severe punishments.” Further, the *Miller* Court stated that it expects life without parole for children to be an inappropriate sentence in most instances. The cumulative effect of this decision has invalidated mandatory life without parole sentencing schemes for children in 28 states and required the consideration of age at the time of sentencing any time a child faces a possible life sentence in the U.S. However, the Court stopped short of eliminating the use of life without the possibility of release or parole and as a result this human rights abuse remains legal in many jurisdictions throughout the United States. In addition to violating the prohibition on imposing this sentence on child offenders, the sentence is used in a racially discriminatory manner violating prohibitions against racial discrimination. Finally, the *Miller* decision did not expressly address *de facto* life sentences.

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<sup>1</sup> *Graham v. Florida*, 130 S. Ct. 2011 (2010).

<sup>2</sup> *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

This report will provide a brief summary of the United States treaty obligations with respect to sentences of life without parole for juvenile offenders and show the Human Rights Council why it should request the United States to accept the recommendations from both the Human Rights Council and the treaty bodies.<sup>3</sup>

## **I. Litigation in U.S. Courts on the use of Life Without the Possibility of Release or Parole Sentences on Children**

Despite movement from the U.S. Supreme Court on scaling back the use of life without the possibility of release or parole sentences on children some states and courts have been reluctant to embrace the fact that children are constitutionally and fundamentally different from adults for the purposes of sentencing. In the wake of *Miller*, the legal issue that continues to be litigated in the court system is whether or not the *Miller* decision should be applied retroactively. That is, whether children previously convicted and sentenced under mandatory life without parole statutes should be entitled to new sentencing hearings where their youth and other mitigating factors could be taken into account by judges. Seven states, including Texas, Mississippi, Nebraska, Iowa, Illinois, New Hampshire, and Massachusetts have ruled that the *Miller* decision is retroactive and that affected individuals should receive a resentencing hearing. The U.S. Department of Justice has also taken the position that the *Miller* decision should be applied retroactively and is not challenging its application in the federal court system. Four states, however, including Minnesota, Louisiana, Pennsylvania, and Michigan have ruled that the decision is not retroactive. As a result, more than 1,100 individuals, almost half of all child lifers in the United States, have been denied the right to a resentencing hearing by state Supreme Courts, perpetuating the abuse of their human rights.

Aside from the application of the *Miller* decision, other major litigation hurdles include the implications of both the *Graham* and *Miller* decisions on the use of de facto life sentences or consecutive sentences imposed that result in a child not being eligible for release or parole until they have served 40, 50, 60, 70, or 80 years or longer.<sup>4</sup> However, some courts, embracing the rationale underlying the *Graham* and *Miller* decisions, have limited the use of de facto life sentences for children.<sup>5</sup> Still, challenges will remain until the issues are fully addressed either by the U.S. or State Supreme Courts or by Congress and the legislatures in each of the states and territories.

## **II. Legislation in the United States on the Use of Life Without the Possibility of Release or Parole Sentences on Children**

Several state legislatures have proactively either eliminated or significantly reduced the use of life without the possibility of release or parole sentences on children. In the wake of the *Miller*

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<sup>3</sup> The data on the sentences has been compiled by the Campaign for the Fair Sentencing of Youth by reviewing cases since the *Miller* decision, see <http://fairsentencingofyouth.org/2014/06/25/two-years-since-miller-v-alabama/>.

<sup>4</sup> *Bunch v. Smith*, 685 F.3d 546 (6<sup>th</sup> Cir. 2012); See also *Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011).

<sup>5</sup> See, e.g., *People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011); *People v. Nunez*, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011).

decision, the legislative trend is to move away from the practice of sentencing children to die in prison, however, it remains a sentencing option as do other de facto life sentences in most states, which both undermine the guidance from the U.S. Supreme Court and violate international human rights law. Since the *Miller* decision came down in 2012, six states, including Texas, West Virginia, Hawaii, Massachusetts, Delaware, and Wyoming have eliminated the use of life without the possibility of release or parole for children as a sentencing option either by amending their sentencing statutes or by providing an opportunity for judicial or parole review after a pre-determined period of time. An additional five states, including Washington, California, Pennsylvania, North Carolina, and Florida have limited the application of the sentence. Some of these states, like Washington for example, have banned the use of the sentence for children under a certain age. Other states, like Pennsylvania and North Carolina, have banned the use of the sentence for felony murder, but have maintained its use for other murder cases. Prior to the *Miller* decision, Kansas, Kentucky, Alaska, Montana, and Colorado had banned the use of the sentence for children. In total, 11 states prohibit the practice of sentencing children to life without the possibility of release or parole.

The state of West Virginia provides a positive example in its recently passed law that eliminates life without parole sentences for children; establishes parole eligibility for every child convicted and sentenced in adult court within 15 years and provides continuous opportunities for parole review thereafter; and requires the court to consider 15 factors when sentencing a child and the parole board to consider certain factors upon review. This model legislation balances holding children convicted of serious crimes accountable for their actions with providing a meaningful opportunity to demonstrate the capacity for change.<sup>6</sup>

However, the vast majority of states in the U.S. (39) still allow the sentence to be imposed in their statutes. We have included a summary of the current landscape of those currently or previously sentenced to serve life without the possibility of release or parole for crimes committed as children, as well as the legislative and legal responses by the states on the issue.

**a. Prevalence of Juvenile Life Without the Possibility of Release or Parole (JLWOP) in Statute and Practice**

There are approximately 2,500 individuals serving life without the possibility of release or parole in the United States today for crimes committed as children. Roughly 35 of those individuals were prosecuted and incarcerated by the federal government. However, since the federal government has taken the position that the *Miller* decision should be applied retroactively, most of the individuals serving the sentence in the federal system are eligible for a resentencing hearing. Nevertheless, those individuals may still receive a life sentence from a federal judge, which would constitute a violation of international human rights norms. The remaining individuals serving life without parole or release for crimes committed as children are spread throughout the individual states. Below is a list of states sorted by the

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<sup>6</sup> HB 4210 available at [http://www.legis.state.wv.us/Bill\\_Status/bills\\_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sesstype=RS&i=4210](http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=HB4210%20SUB%20ENR.htm&yr=2014&sesstype=RS&i=4210).

number of people they have serving juvenile life without the possibility of release or parole. It is important to note that in states designated as having applied *Miller* retroactively or passed retroactive legislation scaling back or abolishing the sentence those previously sentenced are now eligible for resentencing or parole review.

i. **No one known to be currently serving Juvenile Life Without Parole (JLWOP)**

Alaska - (eliminated JLWOP through legislation),

District of Columbia,

Maine,

New Mexico,

New York,

Vermont.

ii. **1-20 people currently serving JLWOP<sup>7</sup>**

Connecticut,

Delaware – (eliminated JLWOP through legislation that IS retroactive),

Georgia,

Hawaii (eliminated JLWOP through legislation that IS NOT retroactive),

Idaho,

Indiana,

Kansas - (eliminated JLWOP through legislation that IS NOT retroactive),

Kentucky - (eliminated JLWOP through legislation that IS NOT retroactive),

Maryland,

Minnesota - (State Supreme Court has ruled *Miller* DOES NOT apply retroactively),

Montana - (eliminated JLWOP through legislation that IS NOT retroactive),

Nevada,

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<sup>7</sup> These categories include people currently serving JLWOP, with some eligible for resentencing hearings as noted.

New Hampshire,

North Dakota,

Ohio,

Oregon,

Rhode Island,

South Dakota - (passed legislation that IS NOT retroactive and allows JLWOP in some cases),

Tennessee,

Texas - (eliminated JLWOP through legislation that IS NOT retroactive; State Supreme Court has ruled *Miller* DOES apply retroactively),

Utah - (passed legislation that IS NOT retroactive and allows JLWOP in some cases),

West Virginia – (eliminated JLWOP through legislation that IS retroactive),

Wisconsin,

Wyoming - (eliminated JLWOP through legislation that IS retroactive).

**iii. 21-50 people currently serving JLWOP**

Arizona,

Colorado - (eliminated JLWOP through legislation that IS NOT retroactive),

Iowa - (State Supreme Court has ruled *Miller* DOES apply retroactively),

Mississippi – (State Supreme Court has ruled *Miller* DOES apply retroactively),

Nebraska - (passed legislation that IS retroactive and allows JLWOP in some cases; State Supreme Court has ruled *Miller* DOES apply retroactively),

New Jersey,

North Carolina - (passed legislation that IS retroactive and allows JLWOP in some cases, but not for felony murder),

Oklahoma,

South Carolina,

Virginia,

Washington – (passed legislation that IS NOT retroactive and allows JLWOP for children 16 years of age and older).

**iv. 51-150 people currently serving JLWOP**

Alabama,

Arkansas – (Passed legislation that IS NOT retroactive and allows JLWOP in some cases),

Illinois – (State Supreme Court has ruled *Miller* DOES apply retroactively),

Massachusetts - (State Supreme Court eliminated JLWOP in *GREGORY DIATCHENKO vs. DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT & others.*, 466 Mass. 655 (2013) and has ruled *Miller* DOES apply retroactively),

Missouri.

**v. More than 150 people currently serving JLWOP**

Florida – (passed legislation that IS NOT retroactive and allows JLWOP in some cases of first degree murder where a child has previously been convicted of a serious offense),

Louisiana – (passed legislation that IS NOT retroactive and allows JLWOP in some cases; State Supreme Court has ruled *Miller* DOES NOT apply retroactively),

Michigan – (passed legislation that MAY BE retroactive and allows JLWOP in some cases; State Supreme Court has ruled *Miller* DOES NOT apply retroactively),

Pennsylvania - (passed legislation that IS NOT retroactive and allows JLWOP in some cases, but not for felony murder; State Supreme Court has ruled *Miller* DOES NOT apply retroactively),

California – (passed legislation that IS retroactive and most children now have access to sentence modification and parole eligibility through the passage of SB 260 and SB 9, however, JLWOP remains a sentencing option for some juvenile offenders).

### III. The Racial Impact of these Sentences

A petition pending before the Inter-American Commission on Human Rights includes information regarding the racial impact of these sentences.<sup>8</sup> While the petitioners are from the state of Michigan and the facts are focused on the racial impact of the sentencing practices in that state, the petition includes information on the overuse of life without parole sentences on Black youth nationwide, which has resulted from “racially tinged” legislative reform based on a variety of factors, including, but not limited to, racial bias in the media about juvenile violence and faulty research in the 1990’s that theorized that a new class of “super-predator” children had emerged who were more violent, remorseless, and radical than ever before.<sup>9</sup> The result of this bias at the national level has meant that Black youth “are serving life without parole at a rate that is ten times higher than that of White youth. While 23.3% of children arrested on suspicion of killing a White person are African-American, African-American youth constitute 42.4% of those receiving life without parole sentences for this crime. White youth, in stark contrast, comprise 6.4% of those arrested on suspicion of killing an African-American, but only 3.6% of those serving life without parole sentences for such killings.”<sup>10</sup>

### IV. De Facto Life Sentences

Finally, *Miller*’s holding has been interpreted by some U.S. Courts as applying only to those sentences that are actually called “life without parole” and do not take into account other sentencing schemes which operate as *de facto* life without parole sentences for minors. Accordingly, in those jurisdictions judges may sentence child offenders to consecutive sentences for each component part of a crime, resulting in a sentence that is equivalent to life without parole but is unaffected by the decision in *Miller*.<sup>11</sup> Nor does *Miller* foreclose the possibility of sentencing a child offender to extremely long sentences, such as 90 years, which amount to life sentences without opportunity for meaningful review.<sup>12</sup>

### V. United States’ Treaty Obligations

Two treaty bodies have recommended that the United States take steps to abolish the sentence of life without parole for child offenders.

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<sup>8</sup> *Hill v. United States of America*, Case. No. 12.866, Petitioners’ Observations & Responses Concerning the March 25, 2014 Hearing before the Inter-American Commission on Human Rights, pp. 9-14 (June 13, 2014).

<sup>9</sup> *Id.* at 11-13.

<sup>10</sup> *Id.* at 13, citing Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 15 (2012).

<sup>11</sup> CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT (University of San Francisco Center for Law and Global Justice 2012) at 7.

<sup>12</sup> *See id.* at 60 (describing the case of Bobby Bostick who was sentenced to 241 years in prison). *But see People v. Argeta*, No. TA103939, slip op. (L.A. Cnty. Ct. Nov. 13, 2012) (holding that a 100-year sentence handed down to a 15-year-old offender is *de facto* juvenile life without parole under *Miller*).

Human Rights Committee 2014 Concluding Observations on the U.S. regarding its obligations under the International Covenant on Civil and Political Rights:

“23. While noting with satisfaction the Supreme Court decisions prohibiting sentences of life imprisonment without parole for children convicted of non-homicide offences (*Graham v. Florida*), and barring sentences of mandatory life imprisonment without parole for children convicted of homicide offences (*Miller v. Alabama*) and the State party’s commitment to their retroactive application, the Committee is concerned that a court may still, at its discretion, sentence a defendant to life imprisonment without parole for a homicide committed as a juvenile, and that a mandatory or non-homicide-related sentence of life imprisonment without parole may still be applied to adults. The Committee is also concerned that many states exclude 16 and 17 year olds from juvenile court jurisdictions so that juveniles continue to be tried in adult courts and incarcerated in adult institutions (arts. 7, 9, 10, 14, 15 and 24).

The State party should prohibit and abolish the sentence of life imprisonment without parole for juveniles, irrespective of the crime committed, as well as the mandatory and non-homicide-related sentence of life imprisonment without parole. It should also ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not transferred to adult courts. It should encourage states that automatically exclude 16 and 17 year olds from juvenile court jurisdictions to change their laws.”

Committee on the Elimination of Racial Discrimination 2014 Concluding Observations on the US regarding its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination:

“Juvenile justice

21. The Committee is concerned at racial disparities at all levels of the juvenile justice system, including the disproportionate rate at which youth from racial and ethnic minorities are arrested in schools and are referred to the criminal justice system, prosecuted as adults, incarcerated in adult prisons, and sentenced to life imprisonment without parole. It also remains concerned that despite the recent Supreme Court decisions which held that mandatory sentencing of juvenile offenders to life imprisonment without parole is unconstitutional, 15 states have yet to change their laws, and that discretionary life without parole sentences are still permitted for juveniles convicted of homicide (arts. 2, 5 and 6).

The Committee calls upon the State party to intensify its efforts to address racial disparities in the application of disciplinary measures, as well as the resulting “school-to-prison pipeline”, throughout the State party, and ensure that juveniles are not transferred to adult courts and are separated from adults during pretrial detention and after sentencing. It also reiterates its previous recommendation to prohibit and abolish life imprisonment without parole for those under 18 at the time of the crime, irrespective of the nature and circumstances of the crime.”

## **VI. Conclusion**

The Campaign for the Fair Sentencing of Youth, Human Rights Advocates, and Human Rights Watch urge the Human Rights Council to recommend to the United States that it accept the recommendations from the Council and the two treaty bodies and that it take steps to abolish the sentence of life without parole for child offenders at the federal level and urge the states to do

likewise and to encourage states to prevent the transfer of offenders younger than 18 to adult court. More specific recommendations for the United States government to consider, include:

- Provide training, technical assistance, and support to local, state, and federal agencies to significantly reduce the presence of youth in the adult system;
- Train judges, prosecutors, defenders, and probation officers in the adult system on adolescent development;
- Promulgate juvenile-specific practice standards for all practitioners that work with youth in the adult system including prosecutors, judges, police, and probation officers alike;
- Support the development and adoption of Trial Defense Guidelines for lawyers representing youth that are eligible for resentencing under *Graham* or *Miller*, or those representing youth that are facing discretionary life without parole (JLWOP) sentences or its functional equivalent;
- Develop enhanced practice protocols for highly specialized areas of representation including juvenile transfer, *Miller* resentencing, and youth facing discretionary juvenile life without parole sentences or otherwise lengthy sentences;
- Convene U.S. Attorneys to discuss their practices and develop strategies to reduce the prosecution of youth in the adult system, specifically regarding transfer and sentencing.
- Work with DOJ to update relevant sections of the U.S. Attorneys' Manual regarding youth in the adult system (*e.g.* transfer, charging, and plea bargaining decisions) to bring current practice in line with recent U.S. Supreme Court cases and juvenile brain and behavioral development science.
- Support initiatives and programs for holding children accountable for serious crimes that focus on individualized youth rehabilitation, such as the Mendota Treatment Center in Wisconsin;
- Continue to work to amend the Federal Sentencing Guidelines to reflect recent Supreme Court cases and emerging juvenile brain and behavioral development science;
- Eliminate mandatory minimum sentences for youth tried as adults and replace it with an individualized sentencing/treatment approach;
- Provide all children with a meaningful and periodic opportunity to obtain release based on their maturity and demonstrated rehabilitation no later than 10 to 15 years after their initial incarceration regardless of offense.
- Use financial incentives similar to those used to urge states to set the drinking age at 21 to urge states to raise the minimum age for life without parole sentences to 18.